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RECENT DECISIONS

COLLECTIVE BARGAINING AGREEMENT—BENEFICIARY CONTRACT—RIGHT OF UNION MEMBER TO SUE.—The defendant entered into an agreement with a union representing his employees. The contract was to run for two years and the defendant was to employ only union men. Among the provisions as to wages and hours there was one which recited that no employee shall be discharged except for cause or for economic reasons, in which case dismissals shall be according to seniority. The plaintiff was dismissed before the contract was terminated and he brings this action for damages for breach of contract, basing his claim either on the theory that the union was his agent in contracting or on the theory that by employing the plaintiff the defendant adopted the union's contract as the plaintiff's. The defendant's motion for summary judgment was granted by the Supreme Court dismissing the complaint and upon appeal to the Appellate Division, *held*, judgment affirmed. The union, in contracting with employers, established rights in itself as a legal entity and not as agents of its members. Adoption as set forth by the plaintiff would run counter to the Statute of Frauds.¹ *Rotnofsky v. Capitol Distributors Corp.*, 262 App. Div. 521, 30 N. Y. S. (2d) 563 (1941).

Employees of employers who have signed collective bargaining agreements with unions have been able to recover for breach of such upon one of three theories generally; the usage, the agency, or the beneficiary theory. Those who hold to the usage theory, also known as the adoption theory, view the collective bargaining agreement not as a contract binding on the employer in his future dealings with employees but as a general offer of what he is willing to be bound by when he employs. The specific acceptance of employment by the individual converts the offer into a contract,² separate and distinct as to each employee.³ The union in such case eliminates the necessity of separate bargaining by each employee. Such usage of the union agreement may become part of the individual employee's contract by express adoption or by the absence of a provision to the contrary.⁴ When the employee seeks to enforce his rights he does so on his parol agreement and not on the union's.⁵ The disadvantage

¹ N. Y. PERS. PROP. LAW § 31. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged or his lawful agent if such agreement, promise or undertaking:

(1) By its terms is not to be performed within one year from the making thereof * * *.

² 11 WILLISTON, LAW OF CONTRACTS (Rev. ed. 1936) § 379A.

³ *Yazoo, etc. R. R. v. Webb*, 64 F. (2d) 902 (C. C. A. 5th, 1933); *Rentschler v. Missouri Pac. R. R.*, 122 Neb. 493, 253 N. W. 694 (1934).

⁴ *Moody v. Model Window Glass Co.*, 145 Ark. 197, 224 S. W. 436 (1920); *Cross Mountain Coal Co. v. Ault*, 157 Tenn. 461, 9 S. W. (2d) 692 (1928); see (1932) 41 YALE L. J. 1221.

⁵ *Illinois Central R. R. v. Moore*, 112 F. (2d) 959 (C. C. A. 5th, 1940).

of this type of interpretation is that the employee may contract contrary to the provisions of the union agreement. This theory is not followed in this state for cases have held that a member may recover the difference between what he agreed to receive and the union contract rate even though he knew what the rate was when he contracted since the employer was already obligated to hire at a set rate and he could not contract below this.⁶ Even if the usage theory was followed in New York the plaintiff would be unable to recover on a contract for two years which was not in writing and signed by the party to be charged,⁷ if this statute is pleaded. The attempt to enforce the agreement on the theory of agency was likewise frustrated by the refusal of the courts to apply such.

New York has allowed union members to recover on the basis of third party beneficiary⁸ since many, if not most, of the provisions of union contracts are for the benefit of the members. In the instant case the plaintiff did not seek to recover as a beneficiary but the court said in *dicta* that he could not recover even as such. The court held the two years' period to be the duration of the contract under which the union was to have certain rights and was not the period of time during which the employee was to work. The possible error of the court may be seen by examining the effect of the provisions of the contract in the instant case. Conditions precedent to the discharge of the employee limit the freedom with which the employer can deal with such individual. Where he is further limited by a closed shop agreement, which has been held valid and enforceable,⁹ he has no choice but to keep the employee until the conditions precedent occur or until the term of the contract comes to an end. Where one is discharged wrongfully under such an agreement he should be able to recover damages.¹⁰ Seniority provisions, as in the instant case, are essentially for the benefit of the employees and, though at first reluctant, courts have to some extent come to look upon the seniority rights as a property right.¹¹ When an employer discharges an employee the damage is to the latter and not to the union; therefore recovery by the union for the breach of a provision forbidding this can be only nominal for the technical invasion of the union's rights.¹² The union has been permitted to recover a substantial sum only in

⁶ Reichert v. Quindazzi, 6 N. Y. S. (2d) 284 (Mun. Ct. 1938).

⁷ See note 1, *supra*.

⁸ Gulickson v. Seglin Const. Co., 152 Misc. 624, 273 N. Y. Supp. 908 (1934); Gulla v. Barton, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914); H. Blum & Co. v. Londau, 23 Ohio App. 426, 155 N. E. 154 (1926).

⁹ Kissam v. U. S. Printing Co., 199 N. Y. 76, 92 N. E. 214 (1910); Gulla v. Barton, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914); Murphy v. Higgins, 12 N. Y. S. (2d) 913 (Sup. Ct. 1939).

¹⁰ Johnson v. American Express Co., 163 S. C. 188, 161 S. E. 473 (1931).

¹¹ McCoy v. St. Joseph's Belt Ry., 77 S. W. 175 (Mo. 1934); Rice, Jr., *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572.

¹² Berney v. Adriana, 157 App. Div. 628, 142 N. Y. Supp. 5 (1st Dep't 1913).

behalf of the employee, as trustee of the beneficiary, where there was a breach of the union contract.¹³ An employee under contract, if discharged before termination without cause, may recover damages up to the date of termination.¹⁴ Obviously, where the union contract is for two years and discharge is dependent on conditions precedent, the employees must be kept for two years if these conditions are not present and ought to recover damages if discharged before. Damages were recovered when an employer discharged an employee before presenting the case to the Arbitration Board as agreed upon with the union, although there was no definite period for the duration of the contract.¹⁵ Likewise, where two weeks' notice was required before discharge and it was not given, recovery was had for this period.¹⁶ As the dissenting opinion stated, the recitals were plainly for the benefit of the employees, and the plaintiff should have based his action on this theory. The plaintiff should have amended his complaint, asking recovery as a beneficiary, and he would have undoubtedly been allowed to go to trial to determine whether the conditions for dismissal were present.

L. S.

CONSTITUTIONAL LAW—BANKRUPTCY—VEHICLE AND TRAFFIC LAW—REVOCATION OF LICENSE.—This is a suit to restrain appellee (defendant) from enforcing a suspension of the appellant's operator's license. The complaint alleges that the order suspending the license was issued May 29, 1940, pursuant to Section 94-b of the Vehicle and Traffic Law of New York,¹ upon receipt by the appellee from

¹³ Barth v. Addie Co., 271 N. Y. 31, 2 N. E. (2d) 34 (1936).

¹⁴ Denniston v. Finnegan, 174 App. Div. 8, 160 N. Y. Supp. 5 (4th Dep't 1916); Cottone v. Murray's, 138 App. Div. 874, 123 N. Y. Supp. 420 (1st Dep't 1910).

¹⁵ Moore v. Illinois Central Ry., 180 Miss. 276, 176 So. 593 (1937).

¹⁶ See note 14, *supra*.

¹ This section, when originally added to the article (L. 1929, c. 695), and despite subsequent amendments (L. 1930, c. 398; L. 1931, c. 669; L. 1934, c. 438), provided, in part, for the suspension of the operator's license and registration certificate of any person against whom a judgment was obtained because of injury to person or property sustained through the operation of a motor vehicle if said judgment was not satisfied within fifteen days after certification of the judgment, its finality and non-payment, to the commissioner of motor vehicles by the county clerk. It directed the commissioner to suspend the license for three years, unless the judgment be satisfied or discharged in the meantime, *except by a discharge in bankruptcy*. (Italics mine.) On May 4, 1936 the section was amended (L. 1936, cc. 293, 448, 771) and a proviso added that upon the creditor's written consent, the debtor might be allowed a license and registration for six months from date of such consent, and thereafter until the consent was revoked in writing, if debtor gave proof of his financial ability to respond in damages. On May 31, 1939 (L. 1939, c. 618) a